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No. 90-584

Supreme Court, U.S.
FILED
NOV 6 1990
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In The

Supreme Court of the United States

October Term, 1990

SOUTHWEST MARINE, INC.

Petitioner,

v.

BYRON GIZONI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

DECISION BELOW

The Decision of the United States Court of Appeals for the Ninth Circuit, reported at 909 F.2d 385 (9th Cir. 1990), reversed and remanded the decision of the United States District Court for the Southern District of California. The District Court had granted the motion of Southwest Marine for summary judgment on the ground that Plaintiff was a ship repairman and not a seaman. Plaintiff's employer, Southwest Marine, Inc., has filed a Petition for Writ of Certiorari, which plaintiff opposes.

JURISDICTION

This petition seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit, entered on July 24, 1990. Consequently, jurisdiction is appropriate pursuant to 28 U.S.C. § 1254(1). This Brief In Opposition For Respondent was timely filed pursuant to 28 U.S.C.§ 2101(c).

STATUTES INVOLVED

The Jones Act, 46 U.S.C. § 688(a):

> (a) Application of Railway Employee Statutes; Jurisdiction.
>
> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 902(3)(G):

> (3) The term "employee" means any person engaged in maritime employment including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –
>
> (G) a master or member of a crew of any vessel; . . .

The Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a):

> The liability of any employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 4.

STATEMENT OF THE CASE

Plaintiff Byron Gizoni was a rigging foreman employed by Southwest Marine, Inc. in San Diego, California. He and the riggers under his supervision manned various barges owned by Southwest Marine, which Southwest Marine insists are "floating platforms", not barges (a distinction which is legally irrelevant).

Nonetheless, plaintiff worked substantially aboard these barges which were used to transport ship parts and ship repair equipment around San Diego Harbor. The barges were moved with tugs between the various piers at Southwest Marine, and from the Southwest Marine yard to the Naval Station at 32nd Street. During these moves plaintiff served as a lookout and gave maneuvering signals to the tugboat operator.

On April 6, 1987, one of the Southwest Marine barges was being used to transport a rudder from the shipyard to a floating drydock where it was to be reinstalled on a U.S. Navy ship. While walking on the deck of the barge, plaintiff's foot broke through a thin wooden sheet which was covering a hole in the deck. In the fall plaintiff suffered disabling leg and back injuries and is unable to work. Because plaintiff was permanently assigned to the Southwest Marine barges he alleged seaman status and sued his employer pursuant to the Jones Act.

Defendant challenges plaintiff's right to claim seaman status and states that he is a harbor worker who is limited to Longshore Act benefits.

However, Section 2 (3)(G) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. Sec. 903, *excludes* "a master or member of a crew of any vessel."

Plaintiff is claiming that he is a member of the crew of the barges. Whether he is in fact a seaman or a harbor worker is a factual issue which must be resolved by a jury.

Defendant Southwest Marine, Inc. brought a motion for summary judgment claiming there were no triable issues of fact, and the motion was granted.

Basically, defendant was able to persuade the District Court to rule on factual disputes which belong in front of a jury such as seaman status and vessel status. Plaintiff's opposition papers contested and controverted these assertions. The District Court misstated the legal definitions of seaman and vessel and chose to ignore the facts and factual disputes.

SUMMARY OF ARGUMENT

It is Plaintiff's position that, pursuant to numerous Supreme Court decisions, seaman status is a factual issue, which must be resolved by a jury. The Supreme Court has broadened the "aid to navigation" requirement to encompass those who contribute to the mission of the vessel, yet defendant wants to narrow it to those who aid the transportation function of the vessel. The Supreme Court has defined vessels as every description of watercraft or other contrivances capable of being used for transportation on water, yet Southwest Marine seeks to exclude work barges in its shipyard.

Southwest Marine wants the district court judges to usurp the jury's power and exclude everyone from Jones

Act coverage who is employed in the ship repair industry, regardless of their roles in the operation of vessels.

ARGUMENT

1. THE DISTRICT COURT AND THE DEFENDANT ARE WRONG IN THEIR CONTENTION THAT DEFENDANT IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

In *Harney v. William M. Moore Building Corporation,* 359 F.2d 649 (2nd Cir. 1066) the District Court dismissed plaintiff's complaint which alleged seaman status because he operated a pump on a crane barge. The Second Circuit reversed and remanded for a jury determination of plaintiff's seaman status. These facts are quite similar to the instant case. Contrary to defendant's argument, the Second Circuit also found a crane barge (similar to the barges plaintiff worked on) to be a vessel in navigation for Jones Act purposes in *Salgado v. M.J. Rudolf Corp.*, 514 F.2d 750 (2nd Cir. 1975).

Floating structures that do not move such as floating dry docks and wharf boats fastened to the shore and used to facilitate the transfer of freight between ship and shore are not considered vessels in navigation for Jones Act purposes. *Cope v. Vallette Dry Dock Co.*, 119 U.S. 625, 30 L.Ed. 501, 7 S. Ct. 336 (1887). On the other hand, where the transportation function of a floating structure is more than just incidental, vessel status is proper. *Brunet v. Boh Bros. Construction Co.*, 715 F.2d 196 (5th Cir. 1983). The

transportation function of the barges that plaintiff worked on was more than just incidental. These barges traveled for miles around San Diego Harbor transporting ship parts and equipment. A barge is a vessel as a matter of law. *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959).

Even if the barges plaintiff worked on are found to be "floating structures" (which they are not), they are *still* vessels for Jones Act purposes. In a very recent decision, the U.S. Supreme Court stated in *Herb's Welding, Inc. v. Gray*, 1985 AMC 1700, 470 U.S. 414, 105 S. Ct. 1421, 84 L.Ed.2d (1985) that "floating structures" are vessels and workers permanently attached to such vessels as crew members are regarded as *seamen* (note 2).

So, even if one were to find that the barges plaintiff worked on are not really barges, but "floating platforms," they are still vessels in navigation for Jones Act purposes, so the distinction is irrelevant for purposes of this litigation.

In *Brunet v. Boh Brothers*, the Fifth Circuit reversed a summary judgment motion denying seamen status to a worker on a barge which supported a pile driving crane. The barge was designed to both support the crane and transport it on a fairly regular basis from one jobsite to another, even though it remained moored at one site for several months at a time. On p. 198 of the *Brunet* decision the Court said,

> "While we agree that the barge was used more often to support the crane than to transport it, we cannot agree that the transportation function was so "incidental" as to warrant a conclusion that the barge was not a vessel as a matter of law.

> This case is materially different from others in which we have found a craft's transportation function to be incidental to the purpose for which it was designed. This was not a platform built ashore and moved to a permanent worksite. It was instead built with mobility over navigable waters as one of its features."

It is clear from the facts of the instant case that the barges plaintiff was assigned to moved ship parts and supplies all over San Diego harbor, and their transportation function was hardly "incidental."

Strange looking, special purpose craft for the oil and gas business, far different from traditional seafaring ships have sometimes been held to be vessels. *Blanchard v. Engine & Gas Compressor Services Inc.*, 575 F.2d 1140, 1142 (5th Cir. 1978). In *Hicks v. Ocean Drilling and Exploration Company*, 512 F.2d 817 (5th Cir. 1975), cert. denied, 423 U.S. 1050, 96 S. Ct. 777, 46 L.Ed.2d 639 (1976), a submersible oil storage facility and drilling barge was held to be a vessel even though it had no motive power itself and, when used for drilling rested on the ocean floor. The fact that the barge could be towed from one point to another was sufficient navigational ability to satisfy the Jones Act, just like the Southwest barges. Non-merchant vessels, such as the Southwest Marine barges are "in navigation" if they are engaged in their expected duties on navigable waters. *Garret v. Dean Shank Drilling Co., Inc.*, 799 F.2d 1007, 1009 (5th Cir. 1986). There is no question that Southwest Marine barges were engaged in their expected duties on navigable waters during the time plaintiff worked on them.

In another case, a drilling barge was used in an offshore oil drilling operation. Her sea cocks would be opened so that she rested on the bottom while drilling took place. In another case, a drilling barge was used in an offshore oil drilling operation. Her sea cocks would be opened so that she rested on the bottom while drilling took place. Her holds would be pumped out and the barge would then be towed by tug to a new drilling site. The plaintiff was a drilling roustabout whose foot was injured when a pipe fell on it. The District Court held as a matter of law that the drilling barge was a vessel and that the plaintiff was a seaman. The District Court granted the plaintiff's motion for a directed verdict. The drilling barge had a hull, navigation instruments and lights, water compartments, pumps, sea cocks, decking, mooring lines and stanchions. In affirming the Court of Appeals said: "It is well settled that a barge may be a vessel. Here we have a special purpose barge designed to serve as a mobile drilling platform. At the time of the accident, the barge was being used for that purpose. The barge is equipped for use in navigable waters, had traveled a considerable distance through such waters to its present site and was, at the time of the accident, located in a navigable canal . . . There is no evidence that the vessel here was not being used for its designed purpose, etc." *Producers Drilling Co. v. Gray*, 361 F.2d 432 (CA 5th 1968).

There is virtually no difference between the Southwest Marine barges and the vessel mentioned in *Producers Drilling Co.* The Southwest Marine barges have no means of self-propulsion, but such barges are still vessels for Jones Act purposes. The Southwest Marine barges were operated in navigable waters and were used to transport ship parts and ship repair equipment.

In *Norton v. Warner Co.*, 321 U.S. 565, 88 L.Ed. 931 (1944), the Supreme Court defined a vessel for Jones Act purposes as "every description of watercraft or other artificial contrivances used, or capable of being used as a means of transportation on water." Although barges, such as the ones owned by Southwest Marine have no power of their own, they are still capable of being a means of transportation on water.

For purposes of this litigation Southwest Marine has magically reclassified all of its barges as "floating platforms." They are not floating platforms – they are barges which are vessels in navigation for Jones Act purposes. Obviously this is a factual dispute which must be resolved by the trier of fact.

Barges with no motive power of their own such as the ones Plaintiff Gizoni was assigned to are vessels for Jones Act purposes. *Norton v. Warner,* supra, 571.

A vessel is always in navigation unless it is under construction, laid up on land, mothballed, or on seatrials. *Reynolds v. Ingalls Shipbuilding Division,* 788 F.2d 264 (5th Cir. 1986). The Southwest Marine barges are certainly vessels in navigation when one considers the holdings in *M/V Marifax v. McCrory,* 391 F.2d 909 (CA 5 Fla 1968); *Boatel, Inc. v. Delamore,* 379 F.2d 850 (CA 5 La 1967); *Gianfala v. Texas,* 76 S. Ct. 141 (1955); and *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958). The barge was performing its mission on navigable waters when plaintiff worked on it.

2. DETERMINATION OF VESSEL STATUS IN A JONES ACT CASE IS A JURY ISSUE

As with other criteria for establishing seaman status, the determination as to whether a vessel is in navigation is, except in rare instances, a question of fact. *Roper v. United States,* 368 U.S. 20, 23 (1961), *Butler v. Whiteman,* 356 U.S. 271, 1959 AMC 2566 (1958); *Fredieu v. Rowan Companies, Inc.*, 738 F.2d 651 (5 Cir. 1984); *Waganer v. Sea-Land Service, Inc.*, 1973 AMC 2627, 486 F.2d 955 (5 Cir. 1973). It has been clearly established that "the 'in navigation' requirement is used in its broad sense, and is not confined strictly to the actual navigating or movement of the vessel, but instead means that the vessel is engaged as an instrument of commerce or transportation on navigable waters." *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 37 (3rd Cir. 1975). Thus, an injured seaman may recover for injuries suffered while on the wharf, or while performing shore based repairs, so long as the vessel is upon navigable waters. *The Tungus v. Skovgaard,* 358 U.S. 588, 1959 AMC 813 (1959); *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 1957 AMC 891 (1957). A vessel may still be considered to be "in navigation" although moored to a pier, or in a repair yard or drydock undergoing repairs. *Wixom v. Boland Marine and Manufacturing Co., Inc.*, 614 F.2d 956, 1980 AMC 2993 [DRO] (5 Cir. 1980); *Warner v. Fish Meal Company,* 548 F.2d 1193 (5 Cir. 1977); *Waganer v. Sea-Land Service, Inc.*, 1973 AMC 2627, 486 F.2d 955 (5 Cir. 1973).

3. THE DISTRICT COURT HAS INCORRECTLY DEFINED AND APPLIED THE "AID TO NAVIGATION" TEST FOR SEAMAN STATUS

On page 12 of the summary judgment hearing transcript, the District Court judge stated that to be a seaman one must be aboard "primarily in aid of navigation" and that rigging was "not navigation." The District Court is off the mark both in the law and the facts.

First of all, one must consider the U.S. Supreme Court's broad definition of the term "aid to navigation."

The most significant Supreme Court holding which expands the "aid to navigation" test is *Norton v. Warner Company*, 321 U.S. 565 (1944), which stated:

> "Navigation is not limited to putting over the helm; it also embraces duties essential for other purposes of the vessel. Certainly members of the crew are not confined to those who can 'hand, reef, and steer.' "

In *Norton* the Supreme Court held that a bargeman who lived aboard a vessel and handled mooring lines and navigation lights was a seaman. The Court further stated that seaman status applied to those who "contribute to and labor about the operation and welfare" of the vessel. This description certainly fits Mr. Gizoni who handled lines and crane hooks in furtherance of the mission of the SOUTHWEST MARINE barges.

The Supreme Court further expanded the "aid in navigation" concept in *Senko v. LaCrosse Dredging Corp.*, 77 S. Ct. 415 (1957) when it upheld seaman status for a *handyman* on a dredge which was anchored and *never* moved during the time of plaintiff's employment.

In a case which touches on all aspects of the seaman issue, *Lunsford v. Fireman's Fund Insurance Co.*, 635 F. Supp. 72 (Ed. La 1986), the Court upheld seaman status for a woman who cleaned a pleasure boat three days a week. The cleaning contributed to the mission and function of the vessel and she was permanently attached to the boat because she did not work on any other vessels.

Since "navigation" means mission or operation of a vessel, it is clear that plaintiff satisfies this aid to navigation requirement for seaman status because he helps to rig on barges that are often used for the purpose of rigging, but he also handles lines, serves as a lookout for the tug operator, ensures the security of the equipment being transported, directs the tug operator from the barge, and participates in the transportation of ship parts around San Diego Harbor. The District Court seems to be confusing the word "navigation" with the word "transportation," but even if one accepts this error in terms, plaintiff Gizoni *did* contribute to the transportation function of the barges, so this issue raises substantial factual as well as legal disputes.

Southwest Marine seems to be relying on *Johnson v. John F. Beasley Construction Co.*, 742 F.2d 1054 (7th Cir. 1984), which basically narrowed the "aid to navigation" test so that one can only be a seaman if he contributes to the "transportation" function of the vessel. This narrowed test is an aberration which is not followed in any other circuit and is inconsistent with the Supreme Court's holding in *Norton v. Warner*, supra. Cooks (*Buna v. Global Marine, Inc.*, 428 F.2d 40, 5th Cir. 1970); and bartenders (*J.S. Warden*, 175 F. 314, S.D.N.Y. 1910); have been found to be seamen. A seaman is one who contributes to the

mission of the vessel, not necessarily the movement of a vessel.

4. WHETHER PLAINTIFF WAS PERMANENTLY ATTACHED TO A VESSEL OR GROUP OF VESSELS IS A DISPUTED FACTUAL ISSUE WHICH SHOULD GO TO A JURY

On Page 12 of the summary judgment hearing transcript, lines 2 and 3, the District Court judge stated that plaintiff was not permanently connected to a vessel. This finding is untrue, and if there is a dispute on this issue, then it is a *factual* dispute which should be resolved by a jury.

In the declaration that plaintiff Gizoni filed with his opposition to the summary judgment motion he stated:

> "I had worked at Southwest Marine for 3½ years as a rigger and rigging foreman. I worked on the crane barge or the work barges every single day. The third shift riggers, of which I was one, regularly worked on the barges and were responsible for the cleanliness of the barges on a daily basis. I was permanently assigned to the Southwest Marine barges and I worked substantially aboard them. I regularly rode the barges while they were underway within the Southwest Marine yard and also when the barges were towed from Southwest Marine to the Naval Station at 32nd Street. During these moves I handled lines and served as a lookout for the tugboat operator and I gave hand signals to the tugboat operator."

This declaration obviously shows a permanent attachment to the barges. To be a seaman, one need not be attached to one vessel, but to a group of vessels under

common ownership and control. This "fleet doctrine" was first discussed in *Norton v. Warner*, 321 U.S. 565, 572 (1944), and further expanded by *Ardoin v. J. Ray McDermont & Co.*, 641 F.2d 277 (5th Cir. 1981); *Robert v. Williams-McWilliams Co.*, 648 F.2d 255, 261-2 (5th Cir. 1981); and *Waguespark v. Aetna Life & Casualty Co.*, 795 F.2d 523 (5th Cir. 1986). Since plaintiff Gizoni was permanently assigned to defendant's barge fleet, he is a seaman.

In *Bullis v. Twentieth Century-Fox Film Corporation*, 474 F.2d 392 (9th Cir. 1973), the Ninth Circuit said on p. 394:

> "The second requirement for seaman status is that there be a more or less permanent connection with the vessel. Significantly the connection may be less permanent, but it cannot be temporary or transitory."

In the instant case, plaintiff's connection to the Southwest Marine barges was hardly temporary or transitory. Working on the barges was a daily part of his job. The Ninth Circuit test in *Bullis* was echoed by the Ninth Circuit in *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326, 1327 (1983). Plaintiff Gizoni worked aboard the Southwest Marine barges everyday. Certainly this is more than a *temporary* or *transitory* connection.

5. SOUTHWEST MARINE'S CONTENTION THAT PLAINTIFF IS PRECLUDED FROM BRINGING THIS ACTION BECAUSE OF THE LONGSHORE ACT IS A MISSTATEMENT OF THE LAW

It is Southwest Marine's position that plaintiff, as a harbor worker, is precluded from bringing this action against his employer by the exclusive remedy provisions

of the Longshore Act. This dispute is the crux of the whole case. It is plaintiff's contention that he would only be bound by the exclusive remedy provision of the Longshore Act if he were found to be a harbor worker by the trier of fact – and this is something which has never occurred.

Sec. 2 (3) (G) of the Longshore Act [33 U.S.C. 092 (2) (G)] excludes from coverage "a master or member of crew of any vessel." Therefore, if a jury found Gizoni to be a seaman, he would be ineligible for Longshore Act benefits.

The District Court stated in its decision that plaintiff was not aboard vessels to aid in navigation but rather to "perform work as a ship repairman." This statement is very misleading. Plaintiff never repaired his employer's barges – he worked on them to transport parts and do rigging operations that were essential to the loading and unloading of parts that had to be transported. He used the barges to repair *other* vessels, just as Mr. Wenzel used the scamp to repair Navy ships in *Estate of Wenzel v. Seaward Marine Services, Inc.*, 708 F.2d 1326 (9th Cir., 1983), wherein the Court ruled that Wenzel's seaman status was a jury issue. The District Court's finding in Gizoni is inconsistent with *Wenzel*.

6. ACCORDING TO THE SUPREME COURT, SEAMAN STATUS IS AN ISSUE FOR THE JURY, THEREFORE IT IS NOT A PROPER SUBJECT FOR A SUMMARY JUDGMENT MOTION

Gianfala v. Texas Company, 350 U.S. 879 (1955); *Senko v. Lacrosse Dredging Corporation*, 352 U.S. 370 (1957); *Grimes*

v. Raymond Concrete Pile Company, 356 U.S. 252 (1958); *Butler v. Whiteman*, 356 U.S. 271 (1958).

The Supreme Court has consistently held that seaman status is a jury issue.

Courts have upheld summary judgments and directed verdicts denying seaman status where plaintiffs worked on fixed oil drilling platforms but slept on a tender vessel that serviced the rig, *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985); and where an anchor handler was hurt on land before any assignment to a vessel, *Ramos v. Delmar Systems, Inc.*, 750 F.2d 389 (5th Cir. 1985); and where a plaintiff performed longshoremen's work by loading chemicals onto vessels serviced by his employer, *Balfer v. Mayonne Mud and Chemical Co.*, 762 F.2d 432 (5th Cir. 1985). In these cases the plaintiffs were working on land and had no relationship to a vessel. They are not analogous to the facts in the instant case.

A significant Supreme Court case was *Gianfala v. Texas Company*, 350 U.S. 879 (1955), involving a death action of a worker who had been assigned to a submersible drilling barge and who had been killed while helping unload pipes from an adjacent cargo barge. A jury found the worker to be a crew member. The Fifth Circuit reversed, holding that the status issue was a question of law to be resolved by the judge, that the drilling barge was not in navigation, and that the decedent was on board as a member of a drilling crew and not as a member of a ship's crew. The Supreme Court, without explanation, reversed and remanded the case to the district court with instructions to reinstate the judgment.

The next Supreme Court decision on the issue was *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370 (1957). The Supreme Court reinstated a state court finding of a seaman status for a handyman on a dredge that had been anchored ashore and used as a stationary earth-moving machine. Senko was a laborer on the dredge who worked an eight-hour shift, ran errands on shore, was paid by the hour, lived at home, drove back and forth each day, and brought his own meals to work. He had no duties connected with moving the dredge and was injured ashore while placing a signal lantern from the dredge in a shack on land. The Court held that "the determination of whether an injured person was a 'member of the crew' is to be left to the finder of fact." *Id.* at 374. Of significance to the Court was testimony regarding Senko's duty "to maintain the dredge during its anchorage and for its future trips." The Court also found it significant that the plaintiff performed almost all his duties on or on behalf of the dredge and therefore considered him to be "permanently attached to and employed by the dredge as a member of its crew." *Id.* at 372. The Court held this was sufficient evidence to support a jury finding of a crew-member status.

After these decisions, the Supreme Court considered only two other cases involving the status issue. *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252 (1958) involved a pile driver who had helped in completing a "Texas tower," a radar relay installation like a fixed drilling platform. Grimes had lived on the tower and kept its equipment in operating condition while it was being towed out to sea. He had performed strictly piledriving duties after the tower reached its location and was

anchored. Several days later, he was injured while returning from a trip from a nearby barge to the tower. The Court of Appeals held that Grimes was not a crew member as a matter of law. The Supreme Court, however, reversed without explanation, citing *Senko*, and *Gianfala*, in holding that there was sufficient evidence to send the status issue to the jury.

The second case, *Butler v. Whiteman*, 356 U.S. 271 (1958), involved a day laborer who had performed odd jobs around his employer's wharf and was killed when he fell off either a barge moored to a wharf or an inoperable tug tied to a barge. The trial court granted the employer's motion for a directed verdict, and the circuit court affirmed, noting that evidence indicated that the tug was not in navigation and the deceased was not a seaman. The Supreme Court, as in *Grimes*, reversed without explanation and remanded. holding that the status issue was a question for the jury.

The Ninth Circuit has followed the Supreme Court in making seaman status a jury issue in a very significant case known as *Wenzel v. Seaward Marine Services, Inc.*, 709 F.2d 1326 (9th Cir. 1983). Wenzel was a diver employed by Seaward Marine Services. From 1979 to 1982 Seaward had a contract with the U.S. Navy to clean ship hulls. The cleaning process was accomplished by divers going underwater with handheld scrapers and brushes and a submerged cleaning and maintenance platform known as a SCAMP. The SCAMP was a saucer shaped unit 6 feet in diameter and 20 inches deep. It traveled along the ship's hull underwater at 54 feet per minute and could be operated manually by divers. Wenzel, a diver/tender,

was assigned to scrape the USS RATHBURNE's underwater sea chest on October 3, 1980, while the SCAMP was *out* of the water. When Wenzel did not surface another diver went underwater and found his body affixed to a sea chest. He had died of asphyxiation. His estate filed a Jones Act claim against Seaward alleging seaman status. Seaward filed a motion for summary judgment arguing that Wenzel was a harbor worker, not a seaman, and the district court granted the motion for summary judgment. The district court's ruling was reversed by the Ninth Circuit, which said that Wenzel's status as a seaman was a close question of fact which had to be determined by the trier of fact.

7. ONLY IN THE *RAREST* FACTUAL SITUATION CAN THE QUESTION OF SEAMAN STATUS BE RESOLVED AS A MATTER OF LAW

Since an individual's status as a seaman depends largely on the totality of circumstances unique to each particular case, only in the rarest factual situation can the question be resolved as a matter of law. *Bodden v. Coordinated Caribbean Transport, Inc.*, 1967 AMC 2731, 2733, 369 F.2d 273, 275 (5th Cir. 1966); see *Barrett v. Chevron, U.S.A., Inc.*, 1986 AMC 2455, 2463, 781 F.2d 1067, 1072 (5 Cir. 1986). It has been recognized that even where the facts are largely undisputed, a question as to an individual's status as a seaman for purposes of the Jones Act is nevertheless "not solely a question of law when, because of conflicting inferences that may lead to different conclusions among reasonable men, a trial judge cannot state an unvarying rule of law that fits the facts." Id. 1986 AMC at 2463-64, 681 F.2d at 1072-73 (quoting *Offshore Company v. Robison*, 1959 AMC 2049, 2064-65, 266 F.2d 769, 780 (5 Cir. 1959); see *Griffith v. Wheeling Pittsburgh Steel Corp.*, 1975 AMC 2527, 2531, 521 F.2d 31, 36 (3 Cir. 1975); *Gahagan Const. Corp. v. Armao*, 1948 AMC 677, 683, 165 F.2d 301, 305 (1 Cir. 1948).

CONCLUSION

According to the United States Supreme Court the parts of the 1972 amendments to the Longshore Act adding the status requirement were intended only to expand shoreside coverage. Coverage on the water side of the shoreline was unchanged by those amendments. *Director, OWP, USDL v. Perini North River Assoc.*, 459 U.S. 297, 103 S. Ct. 634, 74 L.Ed.2d 465 (1983). Thus, there has been no change in the "status" requirements of the Longshore Act nor the Jones Act and thus no need to "clarify" the boundary as suggested by Southwest Marine.

The transportation function test proposed by Southwest Marine, if literally applied, would exclude many who now unquestionably qualify as seamen; for example, cooks on tugs, doctors, bartenders, etc., on oceangoing passenger ships. *See Mahramas v. American Export Line*, 475 F.2d 165 (2d Cir. 1973). This "transportation function" test is inconsistent with the Supreme Court's holdings in *Gianfala*, supra, and *Grimes*, supra.

Moreover, the term "vessel" as defined in the United States Code, 1 U.S.C. § 3, "includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water." Thus it is patently illogical to require that to achieve

seaman status a claimant must perform transportation tasks while the craft to which he is assigned need not be used for that purpose.

Southwest Marine seems to be basing its entire argument on *South Chicago Coal & Dock Co. v. Bassett*, 60 S. Ct. 544 (1940) in which Longshore Act benefits were upheld for a worker assigned to a coal barge. His work consisted mainly of unloading the coal. The Court used a restrictive view of the term "aid to navigation." But this all changed with *Norton v. Warner Co.*, supra, when the Supreme Court upheld seaman status for a handyman on a barge after discussing *South Chicago Coal & Dock Co.*, supra. *Norton* reviewed *South Chicago Coal* and expanded its narrow definition of "aid to navigation" beyond "putting over the helm" to "duties essential for other purposes of the vessel." *South Chicago Coal* is no longer valid law. It was rendered obsolete by *Norton*, and the *Pizzitolo* case is inconsistent with Supreme Court rulings on seaman status.

Southwest Marine envisions a scenario where crewmen on tugs and barges would lose their identity as seaman and lose their Jones Act rights if the tugs and barges are owned by a shipyard. This view is unrealistic and unsupported by the law. For these reasons, Southwest Marine's petition for certiorari should be denied.

Respectfully submitted,

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